AL ANNAMALAI & ANOR

v.

CHANDRASEKARAN THANGAVELU & ANOR

HIGH COURT MALAYA, MELAKA
SURIYADI HALIM OMAR J
[ORIGINATING SUMMONS NO: 24-30-1999]
7 JUNE 1999

FAMILY LAW: *Children - Adoption - Consent of natural parents - When and whether need for consent may be dispensed with - Unreasonable withholding of consent - How is court to determine whether consent being withheld unreasonably - Child happy with adopted parents - Natural parents withholding consent for selfish reasons - Whether application for adoption ought to be allowed - Adoption Act 1952, s. 5(1)*

FAMILY LAW: *Children - Adoption - What must be satisfied by parents intending to adopt child - What factors ought to be considered - Whether welfare of child the paramount factor - Adoption Act 1952, s. 3*

ADMINISTRATIVE LAW: *Remedies - Habeas corpus - Detenue present in court during hearing - Whether can be said that there is unlawful detention - Whether can be said that art 5(2) of the Federal Constitution contravened*

The respondents were the natural parents of one Joyce Kala Vandaiyar ('the child'), born to them on 5 September 1991. As the natural parents were experiencing marital problems at that time, the child was left under the care of the applicants ('the adopted parents') some six months later. The mother of the child personally sent the child to the adopted parents' house. More than six years later, the mother of the child requested the adopted parents to return the child to her care as she claimed that she was on the verge of a reconciliation with her husband. The child, however, refused to follow her natural mother.

Subsequently, the natural parents filed an originating motion for a writ of habeas corpus, alleging that the child was being detained against her will. The adopted parents responded by filing an action for the legal adoption of the child pursuant to the Adoption Act 1952 ('the Act'). Both parties agreed that the court hear the adoption case first, with the other bound by that decision. The child was present in court throughout the hearing.

Held:

[1] To succeed under the Act, certain pre-requisites must be satisfied. These include, *inter alia*, the age requirement and the domicility factor of the applicant, the child having been in the care of the applicant for at least three consecutive months immediately preceding the date of the adoption order and the Social Welfare Department having been informed of the applicant's desire. In the instant case, these statutory requirements had been fulfilled.

[2] No adoption order may be made without the consent of certain stated persons, for example the natural parents as provided for under s. 5(1) of the Act. In certain cases, however, the court may dispense with that consent if satisfied that the child had been abandoned, neglected or persistently ill treated by the parent or guardian, or if the person from whom the consent is required could not be found or is incapable of giving that consent, or such consent has been withheld unreasonably.

[3] Whether consent is being withheld unreasonably or otherwise is to be judged by an objective test. To resolve this test, the court would have to decide whether a reasonable parent acting reasonably would, in all the circumstances of the case, have granted or withheld consent. This is a question of fact and degree, and not of law, based on adequate material before the court to justify that finding.

[4] An adoption order, if made, must have regard to all the relevant circumstances, paramount being the need to safeguard and promote the welfare of the child. Statutorily, the court must take into consideration the wishes of the child, having regard to the age and understanding. Conversely, the wishes of the natural parent or both of them, as the case may be, may also be given consideration. In promoting the welfare of that child, the benefits to be derived from the factors taken into account should not be short term in nature. It is necessary for a judge to immediately analyse the relevant factors systematically and resolve first the initial question of whether an adoption is in the best interest of the child, prior to even considering whether the parent's consent was being withheld unreasonably.

[5] Having considered the affidavits, the statement of the child and the fact that the natural parents wanted the child back merely to assist them to resolve their differences, an adoption is in the best interest of the child. The reasons for the natural parents to withhold the consent was unreasonable.

[6] The child was not "detained" in the physical sense as (i) she was constantly present in court; (ii) she was personally handed over by the natural mother to the adopted parents with the natural mother's blessings; and (iii) the natural mother was rejected by the child when the former wanted to take her back. As the child was never unlawfully detained, what with her being present in court, the court is unable to say that art 5(2) of the Federal Constitution had been contravened.

[Application for adoption allowed with costs; consequential orders ordered; application for habeas corpus dismissed.]

Case(s) referred to:
J v. C [1970] AC 668 ***(refd)***
Re B (A Minor) (Adoption: Jurisdiction [1975] 2 All ER 449 ***(refd)***
Re B (CHO) (An Infant) [1971] 1 QB 437 ***(refd)***
Re B [1995] 3 All ER 333 ***(refd)***
Re D (An Infant) [1977] AC 602 ***(refd)***
Re G (An Infant) [1963] 2 QB 73 ***(refd)***
Re G (TJ) (An Infant) [1963] 1 All ER 20 ***(refd)***
Re M [1995] 3 All ER 407 ***(refd)***
Re Skinner (An Infant) [1948] 1 All ER 917 ***(refd)***
Re Valentine's Settlement [1965] Ch 831 ***(refd)***
Re W (An Infant) [1971] AC 682 ***(refd)***

Legislation referred to:
Adoption Act 1952, ss. 3, 5(1), 6(a)

For the applicant - Balwant Singh; M/s Balwant Singh Sidhu & Co
For the respondent - Manjit Singh; M/s Sri Ram & Co

Reported by S Dharmendran

JUDGMENT

Suriyadi Halim Omar J:

On 5 September 1991, Joyce Kala Vandaiyar (hereinafter called "Joyce"), was born to Jamuna a/p A.S. Sockalingam and Chandrasekaran a/l Thangavelu (hereinafter referred to as "the natural parents"). This child was left in the care of the grandmother immediately after being discharged from hospital. Joyce only stayed with her for six months as in April 1992 the grandmother left for India. Quite promptly, on 1 May 1992 the natural parents brought Joyce to the house of AL Annamalai and Vasantha d/o K Sockalingam Chettiar, respectively the brother-in-law and sister of Jamuna. Jamuna requested that these two persons (hereinafter referred to as "the adopted parents") nurture and take care of Joyce. For good measure the original birth certificate was left with them. The natural mother vide a letter dated 9 April 1996 (exh. A3),

conceded that the adopted parents had been Joyce's "guardian and foster parents since 1992," and supported any decision taken by them regarding Joyce's education and overall well being. The natural parents on the other hand, in their affidavit (encl. 7), denied that they had *de facto* given away Joyce for adoption.

It was not denied by all parties that at that juncture the natural parents were being beset by marital problems. It was also not denied that during that adoptive period, visits were made by the natural parents to see the child. Problems began for the adopted parents when on 18 December 1998, about six years and seven months later, Jamuna appeared on the scene, informing them, that she was on the verge of a reconciliation with her husband. To cement that dawn of a new era, Joyce was required to be returned to their folds. Unfortunately she failed in that attempt as Joyce refused to follow her. The aftermath of this incident was that a police report was made by the adopted parents. Thenceforth bad blood brewed and the relationship of these two family units deteriorated. To cut the story short, the natural parents filed an originating motion registered as 25-13-1998 (interchangeably referred to as "the *habeas corpus* action"), for a writ of *habeas corpus*, alleging that Joyce was being detained against her will. The adopted parents, not wishing to be left out of the legal arena, filed Originating Summons No. 24-30-1999 (interchangeably referred to as "the adoption action") praying for the legal adoption of Joyce pursuant to the Adoption Act 1952. At the hearing date, due to the intertwining nature of the two actions, what with the facts being applicable for both, parties agreed that the court hear the adoption case first, with the other bound by that decision.

This adoption case is one of those dreaded cases where no amount of precedents or legal provisions could neutralise the highly charged atmosphere prevailing at the material time in court. It is not a simple scenario of the judge unfeelingly being required to hand over the child to the natural parents or ensuring that the child is entrenched with the adopted parents, without due consideration of the other condition precedents.

For the proceedings, I had the benefit of the affidavits of both parties and the report from the welfare department. In the privacy of my chambers, without the presence of solicitors I managed to elicit the views of Joyce pertaining to the adoption application. Present at that material time was one Puan Jasvendar Kaur, an interpreter of my court.

Assessment And Evidence Of The Child

Even though there is no requirement in law for me to interview the child, as her wishes could be communicated through the report of the welfare department, in the circumstances of the case I thought it was wise to do so

(*Re G (An Infant)* [1963] 2 QB 73). Before eliciting any evidence from her I conversed casually with her, in the hope of breaking the ice and dispel any possible inhibition that she might suffer from. My good intentions were unnecessary. As it were, I could safely confide that she instead was the one who was trying to make me feel at ease. During the stint in my chambers she was the epitome of good manners. She spoke perfect english and without fear. She informed me that she was studying at the International School. At one stage, and without any prompting she dashed next to my side, opened an album filled with pictures and incessantly explained them. In that exuberance she unfolded the happy setting of the adopted parents' house. In the course of the conversation I posed pertinent questions in the like of whether she was coaxed, coached or threatened by anyone. She answered in the negative. With vehemence she declared that her parents were AL Annamalai and Vasantha, and described Jamuna as her mother's sister. She had absolutely no idea who Chandrasekaran was. She merely described him as "Jamuna's husband". Her aversion of her sister, whom she referred as "Priya", was childish as it evolved around playthings and the normal childish behaviour of that sister.

In some detail she explained why she was happy with the adopted parents and attempted to explain verbally the love that oozed from them. She had no compunction in stating that she did not want to reside with the natural parents nor would want to be separated from the adopted parents. Her intelligence, exuberance, delightful manners and the ease portrayed when communicating with me impressed me greatly. It dawned on me that a wrong decision would certainly snuff those special qualities which she possessed permanently.

The Welfare Department's Report

This report began by introducing the natural father's background and also his income, which was RM7,000 per month as the manager of the Rahman Putra Golf Club. The natural mother, Jamuna, was also interviewed and earned RM1,670 per month as a clerk with Bank Simpanan Nasional. The combined income is RM8,670 per month. The natural father ie, Chandrasekaran has a savings of RM80,000. The natural parents are insured up to RM250,000; Joyce and her sister Priya who is six years old are each insured in the sum of RM50,000. Definitely the natural parents are not in any kind of financial difficulty.

As regards the adopted parents, the approach undertaken by the welfare officer was not dissimilar. He started by introducing the adopted mother who is a housewife, followed by that of the adopted father. The adopted father is an Orthopaedic Surgeon with a clinic of his own. From this practice he derives an income of RM10,000 per month. Apart from that he owns 140 acres of palm oil estate land from which he earns about RM35,000 per month. His monthly income grosses RM45,000.

Apart from that he has a savings of RM170,000, shares worth about RM300,000, a house worth RM500,000 and another shophouse valued at RM135,000. The welfare officer confirmed their financial stability.

The welfare officer confirmed that the natural parents suffered marital problems as early as 1992. Even though a second child was born to them on 14 May 1993, still the marriage had hiccups. Only in 1998 did matters improve. During those turbulent times Joyce stayed with the adopted parents. That officer opined, in his peculiar philosophical way, that the child given away earlier, be returned, was founded on the desire of the estranged parents to reconcile after having been separated for some time. He confirmed that in this case, even though there were positive attempts made to seduce the child back to their folds, the results were not encouraging. He also confirmed that Joyce had been taken care of well by the adopted parents, who also had absolutely no desire to surrender her. Due to the recalcitrance of both parties, the relationship between the siblings (the natural parents and adopted parents), deteriorated. In the process they forgot the welfare of that child. Sad to say, the welfare officer never divulged his eventual stance, thus placing an additional burden on me to read between the lines to discover his view. I must hasten that his view, if any, is only to assist me in arriving at a correct finding, and no more.

Affidavits

The affidavits of both parties were partisan to their respective stance, and at times due to the rhetorics, were not worth reading. Regardless of the aversion, due to sheer necessity I need to enumerate some of the relevant contents. Within the originating summons is enclosed an affidavit in reply which is marked ALA-2, sworn by the adopted father, which among others contained the slanted view of the character of the natural parents. He affirmed that the natural mother had handed over Joyce to him and his wife; embellishing the earlier complaints of the natural mother that the natural father was an alcoholic and an abusive person. That natural father was supposed to have even permitted his friends to flirt with his wife. Added to this bizarre story was the suspicion that the natural father was having an affair with his wife's cousin. Whenever the natural mother came to visit Joyce, on no account was the child willing to respond positively to the overtures. During the period of six years and seven months it was alleged that the natural father only saw Joyce about ten times. Stranger still, the natural parents only saw Joyce at the grandmother's house. The adopted parents absolutely denied that Joyce ever stayed with the natural mother at the grandmother's house.

The adopted parents also produced as exhibits documents which painted the extremely bad relationship that existed between the natural parents, to the extent of them wanting to initiate divorce proceedings. At that stage the natural father stayed in Kuala Lumpur whilst the natural mother in Melaka. As said earlier after matters worsened the adopted parents made many police reports. They even complained to the Welfare Department whereat a file registered as PKMD(MT)K2-88/98(AA) was opened.

The natural parents admitted that previous to 1998 they had some serious marital problems but eventually managed to reconcile. They alleged that they attempted to retrieve Joyce but were rebuffed. In fact when matters got worse the adopted parents even refused to permit the natural mother to meet the child. Due to that refusal they made a police report, registered as U39677 at the Melaka Tengah Police Station. Inspite of the police requesting the adopted parents to return the child, the former refused to do so. In desperation the natural parents initiated the writ of *habeas corpus*. As per encl. 7, the natural parents affirmed that they had merely wanted the adopted parents to take care of Joyce during those hard times. There was never an intention to hand over the adoption rights to them. On that score they reiterated that it was in the best interest of Joyce, which was paramount in the circumstances, if she were to be handed over to the natural parents.

The Law

The Act applicable for the adoption of Joyce is the Adoption Act 1952 (Act 257) (hereinafter referred to as "the Act"), specifically promulgated for West Malaysia. The principal provision for the application is s. 3, which permits the High Court to make the relevant order, authorising an applicant to adopt a child. To succeed under the Act, certain pre-requisites must first of all be surmounted, *inter alia*, the age requirement and the domicility factor of the applicant, the child having been in the care of the applicant for at least three consecutive months immediately preceding the date of the adoption order and the Social Welfare Department having been informed of the applicant's desire. Suffice if I conclude that these statutory requirements, for purposes of this case have been adhered to fully. No adoption order shall be made except with the consent of certain stated persons, for example the natural parents as provided for under s. 5(1) of the Act. In certain cases, the court may dispense with that consent if satisfied that that child had been abandoned, neglected or persistently ill treated by the parent or guardian, the person from whom the consent is required could not be found or incapable of giving that consent, or such consent has been withheld unreasonably. Whether that consent is being withheld unreasonably or otherwise is to be judged by an objective test. To resolve this test the court will have to decide whether a reasonable parent acting reasonably would in all the circumstances of the case have granted or

withheld agreement. This is a question of fact and degree, and not of law, based on adequate material before the court to justify that finding (*Re W (An Infant)* [1971] AC 682; *Re B (C.H.O.) (An Infant)* [1971] 1 QB 437).

Even though an adoption order is a status by itself, it still will not differentiate the previous status of the child, illegitimate or otherwise. Property in an intestacy of an adopted parent passes to the adopted child on the death of the former, as if the child were the child of the adopted parent, born in lawful wedlock. *Vis-a-vis* the natural parent that order will obliterate the legal relationship between the child and them, substituted by a new one. The adopted parent steps into the shoes of the natural parent, and in the course of it, inherits the responsibilities and liabilities of the latter (*Re Valentine's Settlement* [1965] Ch 831; *Re Skinner (An Infant)* [1948] 1 All ER 917). This factor must not be taken lightly prior to the legitimation of the adoption application, bearing in mind that the consequential order will permanently deprive the natural parent or relevant person of his or her parental rights (s. 6(a); *Re M* [1995] 3 All ER 407; *Re G (T.J.) (An Infant)* [1963] 1 All ER 20; *Re B* [1995] 3 All ER 333).

An adoption order if made, must have regard to all the relevant circumstances, paramount being the need to safeguard and promote the welfare of the child. Statutorily, the court must take into consideration the wishes of the child, having regard to the age and understanding. Conversely the wishes of the natural parent or both of them, as the case may be, may also be given consideration (*J v. C* [1970] AC 668). It is absolutely necessary that in promoting the welfare of that child, the benefits to be derived from the factors taken into account, should not be short term in nature (*Re D (An Infant)* [1977] AC 602 at 638). Due to the draconian effect of an adoption order, it is necessary for a judge to analyse systematically immediately the relevant factors, and resolve first the initial question of whether an adoption is in the best interest of the child, prior to even considering whether the parent's consent was being withheld unreasonably (*Re B (A Minor)* (*Adoption: Jurisdiction* [1975] 2 All ER 449).

Factual Finding

Having perused the voluminous affidavits, and the statement of the child, I was impressed beyond doubt that -

(i) she wanted to remain with the adopted parents;

(ii) she did not want to stay with the natural parents;

(iii) she was not comfortable with her younger sister;

(iv) she was absolutely happy being the only child in the adopted parents' home;

(v) educationally, financially, socially and on the health side she was on sound footing;

(vi) provisions had been set aside for the future, and therefore financially secure;

(vii) to uproot her would certainly cause an upheaval in her mental and social stability, bearing in mind her current vibrant character. Her intelligence would certainly rebel against the change;

(viii) the adopted parents conspicuously doted and loved her very much; and

(ix) the desire to adopt her was more for the benefit of the child rather than for their selfish designs.

For some unknown reason I failed to detect the parental love of the natural parents for the child, from the affidavits, inspite of having read them many a time. Likewise in court, I observed that the child had absolutely no inclination to be with them. The gap between them was too obvious for comfort. What tilted the scale in favour of the adopted parent was the fact that the natural parents merely wanted Joyce back just to assist them in their sojourn towards a reconciliation. They wanted her for their purpose, rather than them being there for her needs and welfare. In fact, there is absolutely no assurance that the reconciliation will succeed. What if it fails and a split up occurs again? Is Joyce to be returned again to the adopted parents, sent to the grandmother or subject to some other measures much to the detriment of Joyce's well being? This could not be discounted as the natural parents had done that before when experiencing difficult times. For the life of me, had they been sincere in their feelings for Joyce, one of them could have cared for her during those times, without the necessity of unloading the parental burden onto a stranger. One must bear in mind that at that crucial time Joyce was an infant of seven months who required constant parental attention. The processes of the court therefore should not be made available merely for the indulgence of their whims and fancies. To pander to their selfish intents would certainly, as said much earlier, snuff the exuberance and happiness of this child.

In the circumstances of the case I am fully satisfied that an adoption is in the best interest of the child. Perusing the reasons given by the natural parents, it is my finding that the withholding of the consent is unreasonable. I therefore grant the application for adoption by the adopted parents with costs. I also order the consequential orders of having an entry be made in the Adopted Children Register maintained by the Registrar-General, recording the said child

as "adopted". The Registrar-General shall also include the date of birth of Joyce and record the adoption in the manner indicated in the Schedule to the Adoption Act 1952.

Before winding up, permit me to make the proper orders for the *habeas corpus* application. During the trial I observed certain pertinent happenings which were highly prejudicial to the applicant in the *habeas corpus* case. I noticed that Joyce was constantly present in court, and not "detained" as construed in the accepted and physical sense. Article 5(2) reads:

> Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.

I could not help but conclude that Joyce was not "detained" in the physical sense as:

1. she was constantly present in court, and highly mobile at that;
2. going back in time, she was personally handed over by the natural mother to the adopted parents;
3. the natural mother gave her blessings, as proved by her letter dated 9 April 1996 which acknowledged the adopted parents as being the guardian and foster parents; the symbolic handing over of the birth certificate merely confirmed that positive attitude;
4. Joyce was never kidnapped or forcefully taken away from the natural parents; and
5. the natural mother was in fact rejected by Joyce without any encouragement from any quarters, when the former wanted to take her back.

As she was never unlawfully detained, what with her already in court and free to walk about, I am unable to respond positively to the *habeas corpus* action. With her being present in court, I am unable to say that the above article of the Federal Constitution had been contravened. On that finding, I therefore dismiss the *habeas corpus* application with costs.